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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 JAMES CONTANT, et al.,

4 Plaintiffs,

New York, N.Y.

5 v.

17 Civ. 3139 (LGS)

6 BANK OF AMERICA CORPORATION,  
7 et al.,

8 Defendants.

-----x

9 July 25, 2019

10 11:05 a.m.

11 Before:

12 HON. LORNA G. SCHOFIELD,

13 District Judge

14 APPEARANCES

15 BERGER MONTAGUE PC

Attorneys for Plaintiffs

16 BY: MICHAEL C. DELL'ANGELO

17 SCOTT & SCOTT, LLP

Attorneys for Plaintiffs (FX case)

18 BY: KRISTEN ANDERSON

19 SHEARMAN & STERLING LLP

Attorneys for Bank of America Defendants

20 BY: NINA SHETH

21 PAUL WEISS RIFKIND WHARTON & GARRISON LLP

Attorneys for Defendant The Bank of Tokyo  
Mitsubishi UFJ Ltd.

22 BY: KENNETH A. GALLO

23 ANAND SITHIAN

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## APPEARANCES (Cont'd)

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(Case called)

THE DEPUTY CLERK: Counsel, please state your name for the record.

MR. DELL'ANGELO: Michael Dell'Angelo on behalf of plaintiffs.

MR. RUFFINO: Andrew Ruffino, from Covington & Burling, for the Citi defendants.

MR. GALLO: Ken Gallo, from Paul Weiss, MUFG, Bank of Tokyo.

MR. SITHIAN: Anand Sithian, from Paul Weiss, also for MUFG, Bank of Tokyo.

MR. KANE: Michael Kane, from Berger Montague, on behalf of the Contant plaintiffs.

MS. ANDERSON: Kristen Anderson, from Scott & Scott, on behalf of plaintiffs in the consolidated FX case.

THE COURT: Good morning.

So we are here on plaintiffs' motion for preliminary approval of a settlement. The relief requested is to preliminarily approve the proposed settlement, certify the proposed settlement classes, appoint the named plaintiffs as class representatives, appoint Berger Montague as settlement class counsel, approve the selection of an escrow agent, and stay all proceedings with regard to the two, broadly speaking, settling defendants, except as to the discovery of the settling defendants by the nonsettling defendants, and that's pursuant

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1 to a letter I have from the nonsettling defendants dated June  
2 24, 2019.

3 So I will be happy to hear from the plaintiff.

4 MR. DELL'ANGELO: Thank you. Good morning again, your  
5 Honor. Michael Dell'Angelo, from Berger Montague, on behalf of  
6 the plaintiffs.

7 So we are pleased to present to your Honor for  
8 preliminary approval two settlements. One, broadly speaking,  
9 with Citibank, and the other with what I will refer to as MUFG,  
10 Bank of Tokyo. The settlement with Citibank is for \$9.95  
11 million and the settlement with MUFG is for \$985,000.

12 For the reasons that we have detailed at some length  
13 in our papers -- and I will be happy to go through those, as  
14 you wish, your Honor -- we believe that the two proposed  
15 settlements are fair, reasonable and adequate.

16 With respect to the timing, generally, an important  
17 point I think for consideration with respect to these  
18 settlements is that the Citibank settlement was reached while a  
19 joint Rule 12(b)(6) motion that included Citibank was pending,  
20 so there was considerable uncertainty with respect to whether  
21 or not Citibank would remain as a defendant in the case. As  
22 the Court, I am sure, is well aware, that motion was granted.  
23 So from the risk-waiting perspective of the plaintiffs, at  
24 least as of that time, there was considerable sort of sense in  
25 the decision we reached to make that settlement. Ultimately,

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1 the Court granted leave to amend and all of the nonsettling  
2 defendants were then brought back into the case.

3 A similar circumstance with respect to MUFG. That  
4 settlement was reached while a Rule 12(b)(2) motion was pending  
5 with respect to MUFG and a number of other foreign defendants.  
6 Shortly after the parties reached their agreement, the Court  
7 rendered a decision on the 12(b)(2) motion. A number of  
8 defendants remained in the case; their 12(b)(2) motion was  
9 denied. However, with respect to a number of defendants, that  
10 motion was granted, and included among the defendants as to who  
11 the motion was granted was MUFG.

12 THE COURT: But the settlement remained unchanged; in  
13 other words, the parties stuck with the settlement and with the  
14 amount of the settlement.

15 MR. DELL'ANGELO: That is correct, your Honor, it  
16 remained unchanged. The understanding among the parties with  
17 respect to the settlement is there was a fairly common term,  
18 which is that at the time the MOU, or memorandum of  
19 understanding, was entered, subsequent events would not change  
20 the terms of the settlement and the parties would agree to go  
21 forward.

22 Particularly with respect to Citibank, it is what we  
23 generally characterize as an icebreaker settlement, one having  
24 been made relatively early in the proceedings and for which, in  
25 the calculation of plaintiffs' counsel and the defendants, the

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1 settling defendant in that instance, there is some reduction in  
2 the total consideration, on the theory that it's an early  
3 settlement, parties are getting out early, it may signal to  
4 other defendants the path with respect to how to resolve the  
5 larger case, and as the Court is aware, there are many  
6 defendants in this case.

7           There has been no opposition to the proposed  
8 preliminary settlements as of this time. As the Court noted,  
9 the defendants have requested a modification to the proposed  
10 order with respect to any decision the Court may make as it  
11 relates to class certification for litigation purposes, not  
12 settlement purposes. Plaintiffs have no objection whatsoever  
13 to those modifications, having conferred with the defendants in  
14 advance.

15           The negotiations themselves, as we have indicated in  
16 our papers, were arm's-length, by experienced attorneys on both  
17 sides. They were, I can attest, quite hard-fought and driven  
18 by a rather detailed analyses that we have continued to enhance  
19 and have, I think, reaffirmed the decisions we made and the  
20 numbers that we reached in the course of the settlements. A  
21 lot of that is laid out in our papers, and I will touch on  
22 that.

23           THE COURT: Just a question, which really goes back to  
24 the underlying claims. What you're settling are state claims,  
25 as I understand it, with respect to plaintiffs who reside in, I

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1 think, eight states?

2 MR. DELL'ANGELO: That's correct.

3 THE COURT: How were those states selected?

4 MR. DELL'ANGELO: So there are a number of  
5 considerations that went into the decision to assert claims on  
6 behalf of persons or entities who resided in those states or  
7 traded in those states.

8 So just to be clear, the pending complaint has  
9 proposed class representatives and asserts claims on behalf of  
10 eight proposed state classes, and the settlements track exactly  
11 those eight states.

12 So because this is an indirect antitrust class action,  
13 we are limited first to the states that have repealer statutes,  
14 or have some other path for a plaintiff in those states to  
15 bring an indirect claim, because --

16 THE COURT: It couldn't otherwise.

17 MR. DELL'ANGELO: Right. Illinois Brick doesn't  
18 permit it unless the state has enacted a repealer statute.

19 Beyond that, there is, of course, an analysis of the  
20 underlying state law claims, and really is also driven by a  
21 function of the persons or entities that retained us as counsel  
22 to bring claims. There certainly are other states that may  
23 have repealer statutes, such that an indirect antitrust  
24 purchaser claim could be asserted, but we have not been  
25 retained by plaintiffs in those states, and because we don't

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1 represent them, we haven't included them in the settlement.

2 THE COURT: OK. I am sorry I interrupted you.

3 MR. DELL'ANGELO: No. Thank you for the question.

4 In summary, I indicated the amounts of the  
5 settlements. All the terms between the two settlements are  
6 nearly identical. They provide for considerable cooperation,  
7 some of which has already begun, as the settlement agreements  
8 trigger cooperation, such as the exchange of certain documents  
9 and transactional data. That process is already underway and  
10 has been of considerable value to the class.

11 There are additional cooperation provisions that would  
12 be triggered under the settlement agreements, when and if the  
13 Court were to grant preliminary approval, which we also believe  
14 are of considerable value to the plaintiffs in the class, that  
15 will facilitate in many ways some of the discovery that we wish  
16 to take and help shape the case, as well as give us insight  
17 into how we will shape the case going forward that might not  
18 otherwise be available at this stage of the proceedings. And  
19 then, of course, there are mutual releases.

20 So in making a determination about whether or not the  
21 settlements were fair, reasonable and adequate, we looked at  
22 the settlements in a number of different ways, as we have  
23 detailed in our papers. Those include comparing the  
24 settlements in this case to those in the consolidated FX case,  
25 which I think we generally refer to as the FOREX case. Also



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1 looking at the settling defendants' pro rata share of the total  
2 damages relative to the amounts they agreed to settle for in  
3 this case.

4 We also looked at the Canadian FX settlements, both  
5 Citi and Bank of Tokyo.

6 THE COURT: Tell me a little bit about that action. I  
7 don't really recall any details.

8 MR. DELL'ANGELO: Sure. There was a class action  
9 filed in Canada, and it is my understanding filed in several  
10 different provinces because they have a different system than  
11 our federal system that brings all the cases. So there were  
12 cases, I believe, in different provinces that were effectively  
13 consolidated for settlement purposes.

14 THE COURT: Were you involved in those cases?

15 MR. DELL'ANGELO: I was not. We have just tracked  
16 them.

17 THE COURT: Do you know who the plaintiffs' firm was  
18 in those cases?

19 MR. DELL'ANGELO: We certainly know who they are, yes.  
20 But we haven't had any role whatsoever in those cases.

21 THE COURT: Can you tell me who they were?

22 MR. DELL'ANGELO: The best of my recollection -- we do  
23 cite the case names in our papers -- there is a firm by the  
24 name Siskinds. Sotos LLP is one of the other firms.

25 THE COURT: So, basically, Canadian firms and not U.S

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1 firms with offices in Canada.

2 MR. DELL'ANGELO: No. My understanding is these are  
3 Canadian firms that brought antitrust claims in Canada against  
4 effectively the same group of defendants, save some minor  
5 differences.

6 THE COURT: And both direct and indirect claims, I  
7 think you said.

8 MR. DELL'ANGELO: That's an interesting point, and we  
9 tried to detail that in our papers. In Canada, as we  
10 understand it, the way antitrust claims get brought, there is  
11 not a distinction at the pleading stage between direct and  
12 indirect, and they don't have the Illinois Brick rule that we  
13 have. So when the cases were settled with Citi and MUFG and  
14 the other defendants in the Canadian action, the Canadian  
15 counsel -- we understand from studying their papers, as well as  
16 the notices that they provided, which were very similar to the  
17 US style of notices to the class -- they allocated 80 percent  
18 of the settlement amount to the direct purchaser plaintiffs and  
19 20 percent to the indirect purchaser plaintiffs. And so that  
20 gave us a very clear set of metrics that we could look at, and  
21 look at the dollar amount that Citi paid, back out 20 percent  
22 for the indirect purchasers; we made some adjustments for  
23 population because the population of Canada is larger than the  
24 population of the eight states.

25 THE COURT: Oh, really. I thought you adjusted the

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1 population to the US population and then you adjusted that  
2 number down, but it doesn't matter at all.

3 MR. DELL'ANGELO: We went through this formula to try  
4 to get as close to a one-to-one comparison to look at the  
5 reasonableness. So that is one of the other ways that we  
6 looked at it. We tried to look at the settlements from a  
7 variety of different perspectives to kind of make sure, no  
8 matter how we looked at it, we were within the range of  
9 reasonableness for those.

10 THE COURT: So what I understood is that there are  
11 basically three perspectives from which you looked at it. One  
12 was a comparison to the Citi and MUFG settlements in the FOREX  
13 case; and then the Citi and MUFG settlements in the Canadian  
14 case; and then there was some further analysis and adjustment  
15 for the icebreaker role of Citibank.

16 MR. DELL'ANGELO: That's correct. And there is  
17 another way in which we looked at it as well. We looked at the  
18 total damages that were estimated in the FOREX case and that  
19 were relied on by the parties in this court with respect to  
20 what the range of total damages in that case were. We then  
21 made an estimate of what percentage the retail market in this  
22 case consists of, a subset of those damages in the FX case, and  
23 then made the other adjustments we talked about looking at  
24 population size. And then we looked at the share of the market  
25 that the settling defendants have so we can see what is the

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1 total percentage of damages in this case that the settling  
2 defendants represent. So we also took this pro rata share of  
3 damages approach as well.

4 THE COURT: Thank you.

5 I know that this has taken both some time and some  
6 money to develop the data, and I know that you are being  
7 responsive to my concerns at our prior hearing that there  
8 wasn't enough for me to make a determination of reasonableness.  
9 So thank you very much for that.

10 A question I am curious about, though, is: So as you  
11 were sitting at the negotiating table, as I understand it, you  
12 didn't have all of this data. How did you know when you  
13 arrived at a good number?

14 MR. DELL'ANGELO: In many ways, we did have most of  
15 this data. I will tell you that -- first of all, we had most  
16 of the data.

17 THE COURT: So what did you have?

18 MR. DELL'ANGELO: Well, I will say that we -- and I  
19 appreciate you recognizing the efforts we have taken to kind of  
20 document this for you, in light of your concerns at the prior  
21 preliminary approval hearing. We are exquisitely sensitive to  
22 those considerations.

23 I can't think of any data point that we did not have  
24 when we were entering into the settlement with Citi. So just  
25 by way of example, we knew what the damages estimate range was

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1 in the FX case. We know what eight states were dealing with.  
2 We knew what the population of those eight states was and how  
3 to back that out. We had, in conjunction with Dr. Osler,  
4 already estimated the retail market share, and we have provided  
5 more detail in our papers about that. We had independently  
6 analyzed what we thought the class size was, and we then went  
7 back with Mr. Bibbings, whose expert report is before you, to  
8 get a more, I guess, robust data-driven perspective from the  
9 expert, but it largely tracked what we already believed about  
10 the size of the market.

11 The other thing I will add is, one thing that was  
12 particularly helpful, for as hard-fought as the negotiations  
13 were, the first being with Citibank, Citibank also participates  
14 through a separate entity in the retail market. So they also  
15 had a lot of perspective that they provided to us to help shape  
16 the negotiation.

17 THE COURT: I didn't understand what you just said.

18 MR. DELL'ANGELO: Citibank also has a unit that  
19 engages in retail foreign exchange dealing. And if you look at  
20 Mr. Bibbings' declaration, for example, one of the data points  
21 that he relies on to kind of confirm his conclusions is the  
22 Citibank reports about the number of retail FX traders in the  
23 market. So in the exchange with Citibank, we may not have  
24 ourselves at that time developed as precise a calculation as we  
25 have now, but we were getting the same information that we are

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1 presenting to you now from Citi in the course of the  
2 negotiations to form the ideas that we had about what the  
3 appropriate amounts were.

4 I am happy to say, frankly, that we got it right, and  
5 I think we now have the analyses to provide that to you, in  
6 light of your questions, that spell that out quite explicitly,  
7 and that's what you see in the submission. I would be happy to  
8 walk through those if you like.

9 THE COURT: I spent some time reading them yesterday.  
10 I am not sure it's a useful exercise to go through it again.

11 MR. DELL'ANGELO: I appreciate that, your Honor.

12 So you having laid out the precise relief that we were  
13 requesting, unless your Honor --

14 THE COURT: Here is the last question. I know that  
15 you have asked to defer approval of the form of notice and the  
16 plan of notice in order to get class member identifying  
17 information, and I know that you are also wanting to defer the  
18 plan of allocation, in part because of the prospect of having  
19 additional settlements, and that's obviously something that I  
20 did in FOREX and I am not uncomfortable with.

21 You have also given me a proposed schedule, and if I  
22 were to follow your schedule, and if I were to issue an order  
23 approving the settlement and granting the relief you request  
24 here, about when would we have the submission from you of your  
25 motion for final approval?

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1 MR. DELL'ANGELO: So that is laid out --

2 THE COURT: I am looking at it, but it's 30 here and  
3 60 there, and they run off each other's dates. So I am just  
4 sort of looking for a general bottom line, if that's possible.

5 MR. DELL'ANGELO: Right. I am looking at the  
6 schedule. So the submission of the motion for final approval  
7 is 90 days after the notice date. Notice date is the  
8 completion of notice, which is as it's defined. The notice  
9 date is 60 days after the Court --

10 THE COURT: So that's five months. 90 days plus 60  
11 days.

12 MR. DELL'ANGELO: The motion for approval of the  
13 notice and the plan of allocation is not more than 120 days  
14 after the Court grants preliminary approval.

15 THE COURT: Let's just stop there.

16 You would like to wait to do your plan of allocation  
17 until you have whatever other settlements are likely to occur,  
18 and you're asking for 120 days. My only question is, how  
19 likely is that to happen, how realistic is that time frame?

20 MR. DELL'ANGELO: There are a couple of things. I  
21 think that there is a reasonable likelihood that we may achieve  
22 at least one additional settlement during that time. But more  
23 importantly, the other thing that we would like to do during  
24 that time frame is to gather as much detailed data from  
25 third-party retail foreign exchange dealers as we can.

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1           We have issued, I believe, 66 subpoenas to third-party  
2 RFEDs, as they call them, retail foreign exchange dealers, that  
3 we believe the class members transacted with during the class  
4 period. To the extent that they have the data, and we can get  
5 it through this third-party process, what that would provide us  
6 with are names and addresses for class members. That process  
7 is excruciating, to say the least, but we are making  
8 significant progress and we are on the cusp of getting data  
9 from several of the largest ones. Once we get that data and  
10 process it with the names and addresses, what that will allow  
11 us to do is provide direct mail notice to class members.

12           We would also like to do publication notice, and I  
13 think there are a number of good reasons to do that here. But  
14 the more data and information we get with specific class member  
15 identities, the better notice that we can provide. And I think  
16 that we can satisfy Rule 23(c) regardless of how we proceed.

17           THE COURT: Just so I am clear, I presume that you're  
18 doing the same thing that was done in FOREX, which is you're  
19 not restricting the class to plaintiffs who demonstrably were  
20 injured by these particular defendants' actions; is that right?

21           MR. DELL'ANGELO: Dr. Netz has provided -- we provided  
22 a report by her that talks about the proposed outlines of the  
23 plan of allocation. So the approach is that there was an  
24 overcharge as a result of the conspiratorial conduct, and that  
25 if you were transacting during the time period that is the



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1 settlement class, you, as we propose now, would have the right  
2 to submit a claim. And going back to what we are doing with  
3 the RFEDs, for those that we can get detailed trading data for  
4 the class members, as well as the names and addresses, we can  
5 get quite specific, and for others we anticipate the class  
6 members may have that data where we can't get it from the  
7 RFEDs.

8 THE COURT: So you're leaving yourself with 120 days.  
9 There are many, many, many defendants left. I don't know what  
10 the prospect of settling with any of them are, but I presume  
11 you don't want to go through the notice process twice, or the  
12 claims process twice. So how realistic is the 120 days?

13 MR. DELL'ANGELO: Well, the primary consideration,  
14 from our point of view, is using that time -- the real driver  
15 here is getting as much data as we can. I think that there are  
16 realistic prospects to reach some settlements. Particularly  
17 given the fact that some have not settled even in the FOREX  
18 case, I think it's unlikely that we would have a global to  
19 present to the Court.

20 THE COURT: I understand.

21 MR. DELL'ANGELO: So, yes, we certainly don't want to  
22 confuse the class; we don't want to create difficulties for the  
23 class, but we were sensitive to what the rules require, and  
24 what we were hearing from the Court about moving this process  
25 and making sure the class members were aware and receiving

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1 notice and understanding the settlements.

2 From our perspective, the most important thing is  
3 getting preliminary approval established so that we can  
4 provide -- not only can we get the cooperation going, but we  
5 also think it's important, and I will certainly let the  
6 settling defendants speak to this in greater detail, but from  
7 our perspective, part of the deal, of course, is that they have  
8 settled, they are out of the case, they essentially function  
9 like third parties, and without preliminary approval, ideally  
10 pointing toward final approval, that being what the standard  
11 and effect is, it puts them in a state of limbo not having some  
12 guidance on the preliminary approval, which then makes it more  
13 difficult.

14 THE COURT: I understand.

15 MR. DELL'ANGELO: It also makes it more difficult for  
16 defendants who may wish to settle to come to the table, on the  
17 theory that they don't know where the Court is going with  
18 preliminary approval. But I don't think it's essential from  
19 our perspective that that notice go out and the plan of  
20 allocation go forward. There are efficiencies to be gained by  
21 holding off on that, but we were being sensitive to moving the  
22 process along on some of the issues that you had raised in the  
23 past.

24 THE COURT: The timeline you have presented seems very  
25 reasonable to me, but I also presume that if a modest extension

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1 would result in more efficiency, you would ask for such an  
2 extension, and you shouldn't think that I am precluding that in  
3 any way. I am actually inviting it.

4 MR. DELL'ANGELO: Thank you, your Honor.

5 THE COURT: Let me see if I have any other questions.

6 As I understand it, the plan of allocation, at least  
7 conceptually, is very similar to the plan of allocation in the  
8 FOREX case, in that it's essentially pro rata based on  
9 transactional volume, but there are adjustments for currency  
10 pairs, also the period of time when the people traded, and I  
11 think those are the big drivers.

12 MR. DELL'ANGELO: Yes. You're absolutely right, your  
13 Honor. And to be a little more specific, essentially how  
14 liquid a currency pair was or whether or not it was pegged will  
15 have, and as Dr. Netz demonstrates, could have a significant  
16 impact on what the damages are. So we have taken that into  
17 account as well. So we have tried to track with our own  
18 independent work what made sense to do in FOREX and this Court  
19 looked to as appropriate. So that's correct.

20 THE COURT: All right. I don't think I have any other  
21 questions. I have a request.

22 MR. DELL'ANGELO: OK.

23 THE COURT: And I am not sure if I should make the  
24 request of you or some nonsettling defendant, but what I would  
25 like is a Word version of your proposed order with the

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1 additions that the nonsettling defendants have made that you  
2 have agreed to.

3 MR. DELL'ANGELO: OK.

4 THE COURT: If you could just e-mail that to the  
5 chambers inbox as well as file it. And to avoid complications  
6 with the docketing office, if you make an attachment to the  
7 letter, there shouldn't be any issues.

8 MR. DELL'ANGELO: OK. We would be happy to prepare  
9 that, your Honor. We will pass it by the defendants to get  
10 their approval, and we'd be happy to submit that for your  
11 consideration.

12 THE COURT: OK. The sooner the better.

13 MR. DELL'ANGELO: We will try to get that done today.

14 THE COURT: Thank you.

15 Anything else from anyone?

16 MR. RUFFINO: Nothing to add for Citi, your Honor.

17 MR. GALLO: No, your Honor.

18 THE COURT: We are adjourned. Thank you.

19 (Adjourned)  
20  
21  
22  
23  
24  
25